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6 UNITED STATES DISTRICT COURT  
7 FOR THE WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 ZULILY, LLC,

2:23-cv-01900 JHC

10 Plaintiff,

11 v.

**MOTION FOR SUBSTITUTION  
OF PARTY UNDER FED. R.  
CIV. P. 25(C)**

12 AMAZON.COM, INC.,

13 Defendant.

NOTE ON MOTION CALENDAR:  
JUNE 20, 2024

1 Zulily, LLC (“Zulily”) was an online retailer and the company that  
2 originally brought this action alleging federal and state antitrust violations  
3 against Amazon, Inc. (“Amazon”). Pursuant to Federal Rules of Civil Procedure  
4 25(c) and 17(a), Zulily moves to withdraw as the named plaintiff and to substitute  
5 in its place Old Retail ABC LLC—the entity to which Zulily has made a general  
6 assignment for the benefit of creditors, as a California statutory alternative to  
7 federal bankruptcy (the “Assignment”). Under the Assignment, Zulily  
8 relinquished its legal claims and assets to Old Retail ABC and empowered Old  
9 Retail ABC to prosecute and defend lawsuits brought by or against Zulily.  
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12 The requested substitution will not prejudice Amazon—Old Retail ABC  
13 will pursue the same claims and remedies against Amazon that Zulily would  
14 have pursued but-for the assignment, resulting in no change to the factual  
15 allegations or scope of Zulily’s original claims.  
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17 Counsel for Zulily met and conferred with Amazon’s counsel prior to  
18 bringing this motion. Amazon intends to oppose this motion because Amazon  
19 would like to pursue a “setoff” in this case based on debts Zulily allegedly  
20 incurred during the ordinary course of its business with Amazon. Amazon  
21 contests the substitution, according to its counsel, because it believes that **Zulily**  
22 is liable for any such setoff, but **Old Retail ABC** is not (i.e., there is a lack of  
23 mutuality between Amazon and Old Retail ABC). Taking that as true, Zulily  
24 offered to stipulate that Old Retail ABC would waive any defense that it is the  
25 incorrect party against which to assert a setoff. Amazon declined, stating—for  
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1 reasons unclear to Zulily—that the stipulation would not cure Amazon’s claimed  
2 prejudice.

3  
4 Nonetheless, Old Retail ABC is now the correct party to prosecute Zulily’s  
5 claims and should therefore be substituted as the plaintiff.

### 6 **FACTUAL BACKGROUND**

7 Zulily brought this case alleging federal and state antitrust claims against  
8 Amazon on December 11, 2023.

9 Days later, on December 22, 2023, Zulily entered into a general  
10 assignment for the benefit of creditors under California state law with “Zulily  
11 ABC, LLC.” Cal. Civ. Proc. Code § 493.010. *See* Decl. of Molly Donovan (“Donovan  
12 Decl.”) at Ex. 1. Under the Assignment, Zulily transferred to Zulily ABC all  
13 “claims and assets of Assignor’s business known as Zulily, LLC.” *Id.* ¶ 2.

14  
15 The Assignment empowers Zulily ABC to settle “all claims against or in  
16 favor of Assignor,” including to sue and to prosecute any claim or claims existing  
17 in favor of Zulily. *Id.* ¶ 7(f), and to defend any claim or claims against it “of any  
18 nature whatsoever.” *Id.*

19  
20 Pursuant to the Assignment, Zulily exists now only as a corporate shell  
21 while the assignee – Old Retail ABC – liquidates Zulily’s assets for the benefit of  
22 its creditors who have submitted (or will submit) claims as part of the  
23 Assignment process. To this date, Amazon has declined to submit such a claim—  
24 perhaps believing that it can get a dollar-for-dollar repayment in this case,  
25 without having to stand in line on a level playing field with other general  
26 unsecured creditors, and potentially getting some lesser aliquot payment  
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1 distribution, in the ABC liquidation process. *See* Decl. of Douglas Wilson ¶¶ 4–5.  
2 At any rate, Zulily no longer has any real interest in this matter. It has no records  
3 or documents, nor any right or legal representation to pursue its antitrust claims  
4 against Amazon or to defend itself against Amazon’s claimed “setoff.” All of those  
5 rights and defenses reside with the Assignee – Old Retail ABC – for the benefit  
6 of the ABC estate.  
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8         The other practical reason Zulily is requesting to withdraw is because on  
9 March 15, 2024, Zulily ABC sold the intellectual property rights to the name  
10 “Zulily” to a third-party and agreed to make efforts to eliminate “Zulily” as a  
11 named plaintiff in this case. *Id.* ¶ 6.  
12

13         Pursuant to the terms of that transaction, Zulily ABC changed its own  
14 name to Old Retail ABC LLC, and it became the duty of Old Retail ABC LLC to  
15 try to obtain the Court’s permission to eliminate the name of “Zulily” as the  
16 named plaintiff in this action and remove that name from the caption of this case.  
17 *Id.* *See also* Donovan Decl. at Ex. 2.  
18

19         As the Assignee, under the general assignment for the benefit of all  
20 creditors of Zulily, Old Retail ABC wishes to continue this action to vigorously  
21 prosecute the same claims that Zulily has asserted (or could assert) against  
22 Amazon for the benefit of all creditors of the ABC estate.  
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## 24 STANDARD

25         Federal Rule 25(c) provides that “[i]f an interest is transferred, the action  
26 may be continued by . . . the original party unless the court, on motion, orders  
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1 the transferee to be substituted in the action or joined with the original party.”  
2 Fed. R. Civ. Proc. 25(c). A rule 25(c) substitution does not ordinarily alter the  
3 substantive rights of parties. It is merely a procedural device designed to  
4 facilitate the operation of a case. *See Luxliner P.L. Exp., Co. v. RDI/Luxliner,*  
5 *Inc.*, 13 F.3d 69, 71–72 (3d Cir. 1993) (citations omitted),  
6

7 Courts routinely exercise their discretion to grant substitutions where the  
8 transferee becomes the real party in interest and seeks to continue the case. Fed.  
9 R. Civ. P. 17(a)(3) (requiring that a civil action be prosecuted in the name of the  
10 real party in interest; requiring that the court allow the real party in interest to  
11 “ratify, join, or be substituted into the action.”). In those circumstances, dismissal  
12 of the original plaintiff is appropriate because “that individual no longer has  
13 standing to bring the claims.” *Hicks v. Citigroup, Inc.*, No. C11-1984-JCC, 2012  
14 U.S. Dist. LEXIS 193044, at \*5 (W.D. Wash. Oct. 16, 2012); *see also In re Bernal,*  
15 *207 F.3d 595, 598 (9th Cir. 2000)* (a transfer of notes and the legal rights under  
16 them is a “classic” reason for a Rule 25(c) substitution); *L’Oréal USA, Inc. v.*  
17 *Olaplex, Inc.*, 844 F. App’x 308, 317 (Fed. Cir. 2021) (“Courts have applied [Rule  
18 25(c)] broadly to include transfers by either a plaintiff or defendant of various  
19 kinds of property interests that may be involved in a lawsuit, including  
20 assignment of legal rights.” (quoting 6 James W. Moore, *Moore’s Federal Practice*  
21 § 25.31 (2020) (cleaned up)).  
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25 Indeed, substitutions in favor of the real party in interest “should be  
26 liberally allowed when the change is merely formal and in no way alters the  
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original complaint's factual allegations as to the events or the participants.”  
*Copelan v. Techtronics Indus. Co.*, 95 F. Supp. 3d 1230, 1234–35 (S.D. Cal. 2015)  
 (citation omitted).

Where the original plaintiff is insolvent and liquidated under an  
 assignment for creditors' benefit, it ceases to exist, as a practical matter, and  
 ought to be dismissed for that reason as well. *Valentine v. NebuAd, Inc.*, No. C08-  
 05113 TEH, 2009 U.S. Dist. LEXIS 93454, at \*26 (N.D. Cal. Oct. 6, 2009) (an  
 insolvent party that has executed an assignment for the benefit of creditors  
 “essentially ceases to exist”).

## ARGUMENT

Courts routinely grant motions for substitution where the transferees of  
 legal claims are receivers or trustees tasked with liquidating an estate (as Old  
 Retail ABC is doing here). *First Am. Sav. Bank, F.S.B. v. Westside Fed. Sav. &*  
*Loan Ass'n*, 639 F. Supp. 93, 95–96 (W.D. Wash. 1986) (substituting in a receiver  
 in the action because, for practical purposes, the original plaintiff ceased to exist  
 although not formally liquidated or dissolved); *An Pham v. Allstate Indem. Co.*,  
 No. C10-1844RAJ, 2011 U.S. Dist. LEXIS 144053, at \*7–8 (W.D. Wash. Dec. 13,  
 2011) (finding substitution of the bankruptcy trustee, as the real party in  
 interest, appropriate under Fed. R. Civ. P. 17(a)); *Ritz Camera & Image, LLC v.*  
*Sandisk Corp.*, No. C 10-02787 SBA, 2013 U.S. Dist. LEXIS 94243, at \*5–9 (N.D.  
 Cal. July 5, 2013) (same); *Hicks*, 2012 U.S. Dist. LEXIS 193044, at \*5–6  
 (substituting in bankruptcy trustee as the real party in interest and allowing the

1 original plaintiff to withdraw); *Copelan*, 95 F. Supp. 3d at 1234 (the trustee of a  
2 bankruptcy becomes the real party in interest as to suits the debtor filed prior to  
3 the bankruptcy); *In re Meehan*, AP No. CC-13-1571-DTaSp, 2014 Bankr. LEXIS  
4 4219, at \*13-16 (B.A.P. 9th Cir. Sept. 29, 2014) (holding the trustee has exclusive  
5 standing to pursue prepetition causes of action that have not been formally  
6 abandoned).

7  
8 Here, too, the Assignment transferred all the claims at issue in this  
9 litigation, and the right to prosecute them, from Zulily to Old Retail ABC, as the  
10 liquidator of the Zulily estate. Old Retail ABC, in turn, owes a fiduciary duty to  
11 Zulily's creditors in resolving Zulily's legal claims in the estate's best interest.  
12 Ex. 1 ¶¶ 2, 7. *See Berg & Berg Enters., LLC v. Boyle*, 178 Cal. App. 4th 1020,  
13 1042–43, (2009) (an assignment for the benefit of creditors is a recognized  
14 statutory alternative to liquidation in bankruptcy); *In re Consol. Pioneer Mortg.*  
15 *Entities*, 264 F.3d 803, 808 (9th Cir. 2001) (recognizing that assignees for the  
16 benefit of creditors who take possession and liquidate property of a debtor owe  
17 fiduciary duties to creditors).

18  
19 Substituting Old Retail ABC for Zulily also allows for the most efficient  
20 and simplest continuation of this action—with the real party in interest (Old  
21 Retail ABC) as the sole plaintiff. *Learning Annex Holdings, LLC v. Rich Glob.,*  
22 *LLC*, No. 09 Civ. 4432 (SAS), 2011 U.S. Dist. LEXIS 86003, at \*4 (S.D.N.Y. Aug.  
23 3, 2011) (the purpose of Rule 25(c) is to allow an action to continue unabated  
24 when the interest in a lawsuit changes hands without initiating an entirely new  
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1 suit). Indeed, Old Retail ABC has been placed in the “identical position” as Zulily  
2 was prior to the assignment, i.e., the factual allegations and scope of the original  
3 lawsuit will remain the same. *See Gen. Battery Corp. v. Globe-Union, Inc.*, 100  
4 F.R.D. 258, 263 (D. Del. 1982) (substituting assignee of legal claims as plaintiff  
5 in the action because its claims are the same as the original plaintiff’s).  
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7         Given this, Amazon will suffer no prejudice to its ability to defend against  
8 the original lawsuit on the merits. Plaintiff expects Amazon will claim something  
9 different, i.e., Amazon wants a “setoff” against any antitrust damages awarded  
10 to the plaintiff and believes only “Zulily” is liable for same. Presumably, the setoff  
11 benefits Amazon by allowing it to avoid the ABC process, that all other creditors  
12 of Zulily’s must go through, and where unsecured creditors like Amazon are  
13 unlikely to recover a dollar-for-dollar repayment (except as a result of recovery  
14 against Amazon in this action).  
15

16         While plaintiff does not concede that Amazon has a valid “setoff” claim  
17 against Zulily at all, Old Retail ABC was willing to stipulate, as the sole plaintiff,  
18 that it would not dispute whether it is the right or wrong party against which to  
19 assert such a claim. In other words, Old Retail ABC agreed not to assert a  
20 mutuality defense for purposes of Amazon’s setoff assuming Amazon stipulated  
21 that Zulily could be withdrawn as the named party plaintiff. (Old Retail ABC, of  
22 course, would reserve and not waive all other available defenses). In Zulily’s view,  
23 this agreement would have eliminated Amazon’s claimed prejudice entirely, but  
24 Amazon declined Old Retail ABC’s stipulation nonetheless.  
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1           Whatever prejudice Amazon claims now is of its own making. Whether by  
2 refusing to stipulate or by forfeiting the recovery available to it in the ABC  
3 process, Amazon's inability to recover some or all the debts it is owed by "Zulily"  
4 (if any) is its choice. Setoff, in fact, is equitable and should not be applied in  
5 Amazon's favor under such circumstances. *Baluma, S.A. v. Davydov*, No. 2:20-  
6 cv-001552-KJD-NJK, 2022 U.S. Dist. LEXIS 53006, at \*12–13 (D. Nev. Mar. 24,  
7 2022) (the right of setoff is permissive, not mandatory and its application is  
8 within the court's discretion under the "general principles of equity;" the doctrine  
9 is intended to avoid "the absurdity of making A pay B when B owes A.") (citations  
10 omitted).

13           And setoff is not allowed also where it would contradict an independent  
14 public policy. *See Reed v. Glob. Acceptance Credit Co.*, No. C-08-01826 RMW, 2008  
15 U.S. Dist. LEXIS 61738, at \*20 (N.D. Cal. Aug. 11, 2008) (denying defendant's  
16 request to recover on an underlying debt where doing so would deter plaintiffs  
17 from bringing claims under the Fair Debt Collections Practices Act). Here, the  
18 strong policy in favor of encouraging private plaintiffs to enforce the antitrust  
19 laws would be undermined by permitting Amazon to pursue a setoff. *Perma Life*  
20 *Mufflers v. Int'l Parts Corp.*, 392 U.S. 134, 136 (1968) (discussing the private  
21 action as vital to the enforcement of antitrust policy). Furthermore, the relief  
22 Amazon seeks would prejudice Zulily's other unsecured creditors who are  
23 complying with the statutory liquidation procedures in effect in the Assignment  
24 process.  
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1 Plaintiffs, on the other hand, are allowed to be substituted even where an  
 2 equitable affirmative defense to the original claims (like setoff) would be  
 3 eliminated. In *Copelan*, the court held:

4  
 5 The Court finds that substitution is appropriate. The Trustee has  
 6 decided to pursue this lawsuit on behalf of the creditors and has  
 7 retained counsel to pursue the action. Undisputedly, the change is  
 8 merely formal and does not alter the factual allegations in the lawsuit  
 9 as to the events or the participants. Moreover, the Trustee receives  
 10 the causes of action at issue subject to all pre-petition defenses that  
 11 would have been applicable to Plaintiff if no bankruptcy case had  
 12 been filed. While the substitution of the Trustee precludes the  
 13 application of judicial estoppel, . . . the Court notes that judicial  
 14 estoppel is an equitable doctrine, and using it to land another blow on  
 15 the victims of bankruptcy fraud, which could potentially occur here  
 16 absent substitution, is not an equitable application.

17 95 F. Supp. 3d at 1235 (cleaned up; citations omitted).

## 18 CONCLUSION

19 For all these reasons, the Court should order that Zulily be withdrawn as  
 20 plaintiff and Old Retail ABC LLC, as its Assignee under a general assignment  
 21 for the benefit of creditors, be substituted in its place. Plaintiff requests that the  
 22 Court order the clerk to strike “Zulily” or “Zulily ABC” from all case captions and  
 23 from the ECF system going forward to be replaced with “Old Retail ABC LLC.”

24 Respectfully submitted,

25 DATED: May 30, 2024

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18 We certify that this memorandum  
19 contains 2,360 words, in compliance  
20 with the Local Civil Rules.